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Working Party on GATS Rules

REPORT OF THE MEETING OF 27 JULY 1999

Note by the Secretariat

1. The twenty-fourth meeting of the Working Party of GATS Rules was chaired by Mr. Siva Somasundram of Singapore. The agenda of the meeting was contained in WTO/AIR/1129. It consisted of five items: negotiations on safeguards under Article X of the GATS; negotiations on subsidies under Article XV of the GATS; negotiations on government procurement under Article XIII of the GATS; date of the next meeting of the Working Party; and other business.

2. The Chairman indicated that he had circulated a Note, Job No. 4141 dated 12 July 1999, to assist delegations in their preparation for the meeting. The Note recapitulated where the Working Party stood on its three negotiating issues and proposed a certain structure for the discussion.

ITEM A: NEGOTIATIONS ON SAFEGUARDS UNDER ARTICLE X OF THE GATS

3. The Chairman commended delegations' efforts in reaching an acceptable compromise providing for the extension of the deadline on safeguards. The Working Party's recommendation, which was adopted by the Services Council on 24 June, testified to a spirit of cooperation and flexibility. He hoped that a similar spirit would enable the Working Party to progress with its discussions and successfully conclude the negotiations on safeguards. He urged delegations to contribute not only general statements, but concrete examples of safeguard-type situations, assessments of individual injury and causality concepts, descriptions of the adjustments required, and other relevant issues. Written submissions would be particularly welcome.

4. The Chairman proposed proceeding in accordance with what had been agreed at the previous meeting. He thus invited Members to discuss, first, the question of injury and causality based on indicators listed in Venezuela's informal submission (Job. No. 2860 of 17 May), then focus on alternative safeguard concepts and, finally, take up other items contained in document S/WPGR/W/27/Rev.1 and, in particular, the question of applicable measures.

(i) Concepts of injury and causality

5. The Chairman recalled that several delegations had noted at the previous meeting that more work was needed to explore the relevance of individual injury and causality indicators. The informal paper by Venezuela seemed to be a useful starting-point for such work; several participants had also pointed out the need for flexibility in selecting adequate indicators. He felt that that it would be most productive if delegations deepened their understanding of individual indicators – their significance and their limits – before addressing the issue of flexibility.

6. The representative of Thailand, speaking on behalf of ASEAN, said that a safeguard measure should be applied only after an investigation looking into all relevant factors of an objective and quantifiable nature. The Venezuelan paper was a useful contribution in this respect; it showed that indicators of increased imports, injury and causality were available to the invoking party. All listed indicators were relevant. They were normally available, or could be made available and used for

continued monitoring, supplemented by qualitative analysis. Referring to concerns about confidentiality, he noted that it was for the invoking party, which had the burden of proof, to provide relevant information in the event of safeguard situations. The causal link between increased supplies and injury had to be demonstrated on the basis of objective evidence, using a flexible approach which took into account the specificities of services trade.

7. The representative of the European Communities said that, given the inadequacy of services statistics, it was important to have a broad selection of indicators. They should cover a variety of causes as no single criterion was by itself sufficient. Further work on indicators would also help to determine the feasibility of a safeguard mechanism and, by implication, its desirability.

8. The representative of the Republic of Korea suggested that, in addition to the criteria listed by Venezuela, other factors might be relevant for the determination of injury. Referring to the Agreements on Safeguards and on Textiles and Clothing, he mentioned changes in the level of inventories, reductions in exports, and declining (relative) wages. Indicators based on value-added taxes (VAT) could be misleading as the relevant returns varied significantly between countries.

9. The representative of Japan expressed reservation about the emphasis that some other Members had placed on the need for flexibility; clear procedures and criteria were required to arrive at objective and transparent decisions. It would be difficult to decide *a priori* on this issue. The obligations to conduct public hearings and to grant compensation, contained in Articles III:1 and VIII:1 of the Agreement on Safeguards, were other important issues for future discussion. In addition, he enquired why the last two injury criteria listed in the Venezuelan paper referred to national suppliers only.

10. The representative of Australia concurred that the indicators proposed by Venezuela were a useful starting point to establish the existence of injury. However, substantial losses had to be involved. Before safeguards could be invoked, the link to increased supplies had to be ascertained and the impact of balance-of-payments or macroeconomic problems be ruled out. Measures should be taken on behalf of all domestic suppliers, irrespective of whether they were of national or foreign origin. A *prima facie* case had to be established before the start of an investigation, it had to be based only on factual evidence.

11. The representative of the United States said that the Venezuelan paper was useful in identifying how a possible emergency safeguard mechanism could be structured; concepts like increased imports, injury and causality were essential. He reiterated his delegation's call for real-world examples and, more generally, for problem cases which might warrant safeguard measures.

12. The representative of Venezuela, addressing questions raised in the discussion, said that the list of injury criteria was meant to be illustrative rather than exhaustive. Injury had to be evaluated with respect to a services industry and not necessarily a service. On the point raised by Japan, he noted that all proposed criteria should indeed have referred to national as well as domestic suppliers/markets. Concerning value added taxes, he noted that different tax rates in individual countries and sectors might affect their relevance as an indicator. Further comments would be provided at the next meeting of the Working Party.

13. The Chairman invited delegations' comments on a question which had been earmarked for, but not addressed, at the previous meeting. Should the reasons contributing to increased imports be relevant in determining the permissibility or the actual form of a safeguard measure? For example, should it matter if macroeconomic problems had played a role or an industry's capacity to adjust had been affected by government regulation rather than own weaknesses?

14. The representative of Venezuela said that macro-economic effects had to be eliminated in the evaluation of injury. He also felt that it was necessary, but difficult, to prove that a government's policy had done harm to its own industry. The burden rested on the invoking party.

15. The representative of the United States noted that, depending on the relevant causality standard, the responsibility to prove that injury had been caused by increased imports, rather than by a change in government regulation, might rest on the invoking party. If the increase in imports was to be considered the primary cause of injury, the invoking party had to exclude other potential causes. The representative of Venezuela added that, in his country's legal system, the party opposing the application of government measures would also have to furnish evidence in response to claims made in the administrative process. The representative of the European Communities observed that governments might have a vested interest in proving that they were not responsible for the injury suffered by their industry.

16. The representative of Thailand, speaking on behalf of ASEAN, said that the reasons contributing to increased imports needed to be taken into account in deciding on the permissibility of safeguard action. While he considered the Chairman's questions to be pertinent, he feared that identifying the role of individual factors might imply an element of subjectivity. It was important to use objective criteria. The representative of Venezuela observed that it was difficult to develop examples without a clearer picture of future safeguard disciplines.

17. The Chairman reminded delegations of the suggestion to set up a "checklist" of individual injury and causality indicators introduced in the Working Party. Such a list could be developed in conjunction with a second revision of document S/WPGR/W/27. It would be open for future suggestions and would not prejudice delegations' positions on feasibility and desirability. The Working Party agreed to request the Secretariat to produce an informal document, including the indicators proposed by Venezuela, additional concepts introduced since, and comments made in the Working Party. The Chairman noted that the informal nature of the document would not prevent Members from discussing its content in formal session.

(ii) The question of horizontal versus sector-specific safeguards

18. The Chairman recalled the Working Party's discussion of various concepts previously introduced: (1) Horizontal, generally available safeguards; (2) sector-specific safeguards which would also be generally available; (3) sector-specific safeguards whose content and inclusion in schedules would be negotiated case-by-case; and (4) a "hybrid" approach based on a general framework mechanism whose inclusion in schedules would then be decided through negotiation. Discussions had focused so far on the principle advantages of either approach in terms of transparency, predictability etc., and the relevant legal basis in the GATS. While inviting additional comments, the Chairman also mentioned the possibility, previously raised by the delegation of Japan, that the Working Party temporarily suspended this discussion and rather focused on basic elements which would form part of any safeguards mechanism. It might be possible to work out common rules and principles, which would be equally relevant for horizontal and scheduled safeguards. The United States submission of 17 March 1997 (S/WPGR/W/17) contained an illustrative list of such rules and principles. These included the requirement to give adequate advance notice before invocation; use safeguards only temporarily and with a specified maximum period of duration; limit access to a given safeguards-type provision – for example, once during the course of a specified period of time – and prevent re-invocation during the specified period; apply safeguards on a degressive basis; clearly specify the envisaged action by mode and sector or sub-sector; respect "established rights" (although a different term was used in the paper) if limits were imposed on mode 3; and waive compensation if the rules are respected. Although some of these issues had already been touched upon in the discussion of document S/WPGR/W/27/Rev.1, they might warrant greater attention with a view to reaching a common understanding.

19. The representative of Hong Kong, China found this idea useful. The paper submitted by his delegation, document S/WPGR/W/18, shared many of the elements proposed in the United States paper, such as the need for advance notice, temporary application, application on an MFN basis, objective and identifiable criteria. His delegation was still considering, however, whether a safeguard mechanism needed to be paired with a commitment to liberalize and whether compensation should be waived. Further elaboration of such issues would be a way forward.

20. The representative of Thailand, speaking on behalf of ASEAN, noted that it was widely accepted in the Working Party that sector-specific safeguards, if any, should be made generally available. No link should be established between an emergency safeguard mechanism and scheduling. Without prejudice to this question, ASEAN was ready to discuss the elements contained in the United States' paper which was a useful contribution. However, it remained limited in scope as it dealt only with scheduled safeguards whose legal basis in the GATS was not beyond doubt. He sought further clarification on the "hybrid" approach proposed by the United States delegation, in particular on the question whether general framework rules would apply across all sectors while the measures would be sector-specific.

21. The representative of Japan said that, while his delegation was still considering the different forms an EMS could take, it was inclined to support a horizontal approach. Safeguards were meant to deal with unforeseen developments which, by implication, could not be predicted and scheduled. To advance the discussion at that stage, however, the Working Party should rather focus on the basic elements of any mechanism: All elements contained in the United States' submission were relevant in this context. However, unlike the United States, his delegation felt that it was not always necessary to specify an action by mode; it should be left to Members to make this choice.

22. The representative of Switzerland echoed Japan's view that most of the elements listed in the United States' paper - such as temporary application, degressivity, clearly specified criteria, MFN application, no divestment - were central to any safeguard mechanism. On the issue of compensation, he felt like Hong Kong, China that more reflection was needed. Without a requirement to compensate, safeguards could lend themselves to abuse, especially by powerful domestic interests.

23. The representative of Mexico said that her delegation favoured horizontal safeguards on the grounds of transparency and integrity. In view of the peculiarities of services trade, however, such a mechanism might need to be flexible and, in addition to general rules, allow for sector- or mode-specific solutions. She called for practical examples to advance the discussion. A safeguard mechanism should be available to all WTO Members, without prejudice to provisions for special and differential treatment of developing countries. Access must not in any way be linked to scheduling or made contingent on other GATS provisions, such as Article XXI, which pursued different ends. Several elements listed in the United States' paper should be used, such as adequate advance notice; degressive and temporary application; maximum duration (with special treatment for developing countries); MFN application; and objective and identifiable criteria. On compensation, closer examination was necessary. Compensation would imply that safeguards protection was at a cost to the invoking Member, thus limiting its use to exceptional circumstances and preventing any protectionist abuse. In addition, the concept of adjustment could be added to ensure that the sectors protected were committed to carrying out adjustment with a view to regaining competitiveness by the time the measures were removed.

24. In response to an issue raised by Thailand, the representative of the United States noted that the principle scope of emergency safeguard measures should be addressed in a context different from the rules governing application. In his delegation's view, measures would be sector-specific and scheduled, whereas the general rules would be horizontal. Without prejudice to the final mechanism, elements of these rules could be discussed. On compensation, his delegation was still examining the issues involved - including concerns about abuse - in the light of Article XXI which was a potential

alternative. If a safeguards mechanism were to be put in place, and if it contained a compensation requirement, this might create a bias in favour of modifications of commitments under Article XXI which were available without proof of injury or causality.

25. The representative of Japan concurred that the relationship between a possible safeguard mechanism and the provisions under Article XXI needed to be clarified. A safeguard measure should be easier to invoke in principle, but only for a limited period. The need for compensation should be further examined with a view to achieving a balance between easy availability of safeguards and prevention of protectionist misuse. The experience in the area of goods could help to inform the discussion on this issue.

26. The representative of the European Communities observed that a possible safeguards mechanism and the provisions of Article XXI had to accommodate different situations. A safeguard mechanism would be in place to respond speedily to emergency cases, which could be addressed and solved within a relatively short period of time, whereas Article XXI modifications dealt with longer-term changes in competitive conditions of a systemic nature.

27. The Chairman said that the Working Party should revert to discussing basic elements of a safeguard mechanism at the following meeting. He invited delegations to re-examine the relevant submissions by the United States and Hong Kong, China.

(iii) Applicable measures and other relevant issues

28. The Chairman noted that the question of applicable measures was one of the few items of document S/WPGR/W/27/Rev.1 which the Working Party had not yet discussed in depth. He suggested that Members consider, first, whether safeguard actions should be limited to the suspension of commitments under Article XVI and XVII or also include commitments under Article XVIII, and, second, whether there should be a preference for measures such as subsidies. Their application might prove more transparent, more predictable and less distortive from a supplier's perspective than, for example, quotas, while quotas might be deemed less costly and more efficient from the invoking country's perspective.

29. The representative of Thailand, speaking on behalf of ASEAN, said that the main safeguard measures envisaged were restrictions on market access and suspensions of national treatment, but the possibility of suspending commitments made under Article XVIII should not be precluded. Subsidies as safeguard measures amounted to a suspension of national treatment; they were preferable on transparency and predictability grounds. Nevertheless, the applicability of different types of safeguard measure needed to be evaluated for each mode; actions under mode 3 had to take acquired rights fully into account.

30. The representatives of Hong Kong, China and Japan agreed that, in general, the possibility of suspending commitments under Article XVIII should not be ruled out and that priced-based measures, including subsidies, were in principle preferable to quotas. However, more time was needed to discuss concrete examples and reach a final decision. The representatives of Japan and Uruguay also said that the on-going negotiations under Article XV of GATS might help to further clarify subsidy-related questions. Noting that subsidy-type remedies represented departures from national treatment, the representative of Japan recognized that Members might also want to suspend market-access commitments.

31. The representative of the Republic of Korea observed that the Agreement on Safeguards did not specify the type of restrictions to be applied. While its Article 5 prescribed the level at which any quantitative restrictions should be set, Article 6 provided that provisional safeguard measures be price-based. He felt that it might be useful to review the historical background of these provisions

and, in addition, clarify who would pay for any subsidies. Recognizing that price-based measures were in principle preferable to quantitative restrictions, he added that, given that the main purpose was to remedy injury (or threat thereof) caused by increased imports, quota-type restrictions tended to have shorter implementation periods and produce immediate results. The representative of Egypt concurred that the choice between subsidies and quota-type measures depended on the situation to be remedied; the fact that safeguard measures were applied only for limited periods had to be taken into account.

32. The representative of the United States said that his delegation was still considering the possibility of suspending Article XVIII commitments. However, it would be a matter of concern if regulatory principles, including those under the telecommunications Reference Paper, could be suspended as well. While quotas tended to be the most disruptive type of trade restriction, it was not clear whether subsidies were able to meet all positive expectations associated with price-based measures. The representative of Uruguay expressed doubts about the perceived advantages, in terms of transparency, predictability and less distortive effects, of subsidies.

33. Concluding on this item, the Chairman said that Members recognized that applicable measures could involve the suspension of commitments under Article XVI and XVII. While some concerns had been raised about the withdrawal of Article XVIII commitments, no delegation had ruled out this possibility at that stage. The discussion on whether price-based measures (e.g. subsidies) were preferable to others (e.g. quotas) had not yet led to clear conclusions. While price-related measures were considered to be more transparent, less distortive and disruptive by some delegations, others noted that quota-type restrictions offered more immediate remedies. The key challenge was to identify the best available remedy from the perspective of all parties involved, and the Working Party would need to revert to this issue at its next meeting.

34. The Working Party requested the Secretariat to prepare a second revision of S/WPGR/W/27, tracing the discussion on emergency safeguards at this and the past two meetings. In this context, the Chairman encouraged delegations to use the summer break to reflect on the structure of future discussions and submit suggestions which he would then circulate in his preparatory Note for the next meeting. Ideally, the submissions should include concrete cases where safeguards, of one type or another, might be needed and outline the implications for future rule-making.

ITEM B: NEGOTIATIONS ON SUBSIDIES UNDER ARTICLE XV OF THE GATS

35. The Chairman drew the Working Party's attention to a recent submission from Hong Kong, China under the information exchange programme pursuant to Article XV. It had been circulated as document S/WPGR/W/16/Add.3.

36. The representative of Hong Kong, China explained his authorities' response to the relevant questionnaire. It excluded expenditure for a range of social services and social welfare programmes which governments throughout the world maintained in pursuit of legitimate welfare objectives. Subsidies for services supplied in the exercise of governmental authority, as defined in Article I:3(b) of the GATS, had also been excluded. All subsidies listed in the response were granted on a national-treatment basis under mode 3. While compliance with national treatment was likely to reduce any trade distortive effects, such subsidies might nevertheless cause spill-over effects between modes. According to the Scheduling Guidelines (document MTN.GNS/W/164), Members were not obliged, however, to extend national treatment to suppliers established outside their territorial jurisdiction. Nevertheless, the submission recommended that the issues involved - distortive effects and mode specificity of subsidies - be further discussed by the Working Party. This could help to clarify the meaning of national treatment under modes 1 and 2 and, in turn, might enable Members to schedule more significant commitments for national treatment especially under these modes. As a

preliminary response to a question from the delegation of Japan, he explained that all subsidies were provided to established service suppliers only.

37. The representative of Brazil noted that discussions in the General Council had shown a broad consensus for negotiating subsidy disciplines under Article XV in the next round. Although only three delegations had yet responded to the relevant questionnaire, it was important that the mandate of Article XV be met. Subsidy disciplines were in the interest of all Members and in particular of developing countries, which often lacked the resources for active subsidization. He suggested that Members take up again relevant issues raised in the Secretariat background paper on subsidies, document S/WPGR/W/9, in order to advance work.

38. The representative of Guyana noted that some Members had excluded subsidies from national treatment obligations, while others had undertaken full commitments. The resulting imbalance was a matter of concern; it could seriously affect the competitive position of developing country suppliers in foreign markets. He felt that any disciplines to be developed under Article XV would need to take this disparity into account.

39. Summing up the discussion on this item, the Chairman reminded delegations of the information exchange requirement under Article XV. In his preparatory Note for the next meeting, he intended to draw attention to core issues raised in the Secretariat background paper on subsidies.

ITEM C: NEGOTIATIONS ON GOVERNMENT PROCUREMENT UNDER ARTICLE XIII OF THE GATS

40. The Chairman recalled that, during the past two meetings, several delegations had suggested definitions, or elements of a definition, of what could be considered government procurement of services. The notion of financial responsibility, i.e. the assumption of the financial risks and benefits associated with the purchase of services, seemed to be widely considered one suitable criterion to distinguish procurement from other forms of government involvement. He invited delegations to introduce any additional criteria and comments into the discussion.

41. The representative of Australia said that, following domestic consultations on how to define government procurement, her delegation now supported a broad definition. This was a pragmatic move since the processes of choosing contracts, as well as the relationship between companies and government, were generally identical and not influenced by notions of financial responsibility. Government procurement was thus considered to include all three categories in the hierarchy Australia had originally suggested: first, government purchases of services for consumption by the government; second, government purchases of services for consumption by the public; and, third, contracts between the government and private companies for the commercial provision of services to the public or to industry. The latter category was covered by the definition of GATS Article XIII because it was the government that initiated and organized the supply of the service and, thus, enabled the public to consume it.

42. The representative of Canada felt that the term "hierarchy" was not appropriate as it implied the setting of priorities; she proposed using a more neutral term such as "listing". The representative of the European Communities said that the definition offered by Australia was broad and wondered how it squared with relevant GATS provisions, given that the Working Party was mandated to deal with transactions not currently covered by the GATS.

43. The representatives of Venezuela, Brazil and Mexico noted that in their national legislations, concessions did not fall, and could not be categorized, under government procurement. The representative of Mexico suggested that examples be given under each category proposed by Australia. She wondered how this categories related to the concept of financial responsibility, which

many delegations considered relevant. In response to several requests, the representative of Australia undertook to submit her contribution in writing.

44. The representative of Hong Kong, China said that considerations related to the structure of the relevant market were important in determining what fell under government procurement. The representative of the United States suggested that the Working Party set aside its discussion on concessions for the time being and rather develop a genuine definition of government procurement. By default, it would also inform the definition of concessions.

45. As mentioned in his preparatory Note, the Chairman suggested further examining the range of entities considered to conduct government procurement. At previous meetings, it had been said that, in principle, entities at all government level should be covered, and that government ownership and control were important criteria. The legal form of operation or incorporation had not been mentioned as relevant. Some delegations had noted, however, that attention should be given primarily to entities enjoying some degree of exclusivity, i.e. to entities not fully subject to market disciplines. He invited delegations to further elaborate on these issues.

46. The representative of Canada said that government ownership and control were critical factors in defining government procurement. The representative of Hong Kong, China favoured in principle the inclusion of entities at all levels of government, but was not sure whether the legal form of operation or incorporation should be a determining factor. Criteria related to the form and structure of the markets concerned needed to be considered as well.

47. Notwithstanding the importance attached to definitional issues, the Chairman remarked that the negotiations under this item might benefit from Members giving thought to their ultimate purpose. This included in particular the question what common disciplines, if any, might be agreed upon at the end of the process. A prominent candidate would be the concept of non-discrimination. The Working Party endorsed his proposal of raising pertinent questions in the preparatory Note for the next meeting.

ITEM D: DATE OF THE NEXT MEETING

48. The next meeting is scheduled to take place in the vicinity of the October meetings of the Committee on Government Procurement and the Transparency Working Group, possibly on Friday, October 8, 1999.

ITEM E: OTHER BUSINESS

49. No matters were raised under this agenda item.
